

[40102/00303]

U.S. PATENT APPLICATION

For

*System and Method for
Flexible Underwritten Equity Facility (FUEL)*

Inventor(s):

Jeffrey Solomon
Marran Ogilvie and
Jeffrey Smith

Prepared by:

FAY KAPLUN & MARCIN, LLP
100 Maiden Lane, 17th Fl.
New York, NY 10038
(212) 898-8870
(212) 208-6819 / (212) 898-8800 fax
info@FKMiplaw.com

Express Mail Certificate

"Express Mail" mailing label no. EL 654 661 079 US

Date of Deposit: July 12, 2001

I hereby certify that this correspondence is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 110 on the date indicated above and is addressed to Assistant Commissioner for Patents, Washington, D.C 20231

name: Oleg F. Kaplun (Reg. No. 45,559)

Signature



A SYSTEM AND METHOD FOR FLEXIBLE UNDERWRITTEN EQUITY FACILITY
(FUEL)

Related Applications

[0001] This application claims the benefit of (1) U.S. Provisional Patent Application Serial No. 60/241,771 filed October 19, 2000 and entitled "Firm Underwritten Equity Facility" and (2) U.S. Patent Application Serial No. 09/757,215 filed January 19, 2001 and entitled "A System and Method for Firm Underwritten Equity Facility (FUEL)". Both applications are expressly incorporated herein, in their entireties, by reference.

BACKGROUND INFORMATION

[0002] Generally, a company may raise capital by selling its equity to public markets. This process, which is shown in Figures 1 and 2, is called "underwriting." The underwriting process is initiated when an Issuer 10 hires an investment banking firm ("Underwriter 20") to raise capital through offering the Issuer 10's equity (e.g., its common shares) ("Offering") to the public markets 40 (step 105).

[0003] There are two main varieties of these Offerings. The first time that the Issuer 10 accesses the public markets 40, the Issuer 10 conducts an Initial Public Offering ("IPO"). On the other hand, if the Issuer 10 has already raised capital

in the public markets 40, then the Issuer 10 may conduct what is known as a Follow-On Offering ("Follow-On Offering").

[0004] The first step for the Underwriter 20 is to conduct a due diligence review of the Offering (step 110). The due diligence review usually involves a detailed review of the Issuer 10's financial statements, its performance and its prospects for the future, etc. After the due diligence review has been completed and the Underwriter 20 is satisfied with the results of this review, the counsel for the Issuer 10 and the Underwriter 20 prepare a prospectus of the Offering. The prospectus discloses certain information regarding the financial condition of the Issuer 10 and the terms of the Offering (step 115).

[0005] Subsequently, the prospectus is filed with a Regulatory Agency 30 (e.g., the Securities and Exchange Commission) (step 120). The Regulatory Agency 30 reviews the prospectus to determine whether the prospectus complies with applicable laws and regulations and provides adequate disclosure regarding financial risk factors of the company and risk factors associated with making an investment in the company. Upon determining that the prospectus is in compliance, the Regulatory Agency declares the prospectus to be "effective" (step 125). Simultaneously, the Underwriter 20 and the Issuer 10 may market the prospectus to the public (e.g., by publishing "red herring" ads) (step 130).

[0006] In step 132, the Underwriter 20 determines, in view of particular market conditions, the key terms of an Offering.

In particular, the Underwriter 20 must find a group of potential buyers willing to purchase a certain volume of the Issuer 10's equity and ascertain the conditions under which they are willing to make such a purchase. Based on the demand from this group of buyers and other market conditions, the Underwriter 20 determines a price, volume and timing of the Offering. For example, it is common for the Underwriter 20 to increase the size and/or price of the Offering when it has received a large number of orders which exceed the original volume of the proposed Offering.

[0007] The Offering is considered to be closed when the deal is done, e.g., when the willing group of buyers is found at a particular price the Underwriter 20 is looking for (step 135). Subsequently, when the Issuer 10's equity is sold to the public market 40, the Underwriter 20 obtains its commission.

[0008] In certain circumstances, the public markets 40 may be unreceptive to Follow-On Offerings or the Underwriter 20 may not be interested in conducting a Follow-On Offering for a particular Issuer 10. Follow-On Offerings may also entail considerable expense to the Issuer 10 and often present significant risks. For example, a Follow-On Offering may be postponed or cancelled for market reasons or the Underwriter 20 may set a price for the equity which is undesirable to the Issuer 10.

[0009] Furthermore, there may be a long delay between the time at which the Issuer 10 decides to conduct a Follow-On

Offering and the actual date of the Offering. During the intervening time, market conditions may change significantly. This imposes an added layer of risk in that, by the time of the Offering, the previously set price may have become unacceptable to the Issuer 10. For example, the Issuer 10's stock may be trading at \$25.00 per share when the Issuer 10 decides to conduct a Follow-On Offering. If, by the time steps 105 through 135 are performed, the stock is trading at \$10.00 per share, the Issuer 10 may be counting on the capital that it feels that it has no choice but to go forward with the Offering at this unacceptable price. Thus, for the reasons stated above, Follow-On Offerings are often considered an inefficient way to raise capital.

[0010] Another option is for the Issuer 10 to raise equity capital by utilizing a series of private offerings of common stock with subsequent registration of the common stock (i.e., a serial private placement). The private offerings may be offered to Qualified Institutional Buyers ("QIB") as defined by applicable laws. Private offerings offer the Issuer 10 the ability to structure private placement transactions as a series of private placement transactions with multiple optional tranches. Such transactions provide certain benefits to the Issuer 10 (e.g., ability to continuously raise capital) and the terms of transactions provide for market derived pricing during a predetermined valuation period. For example, if the Issuer 10 wants to sell \$1 million worth of its stock over the next 10 days, the pricing may be a percentage (e.g., 90%) of a 10 day average price for the stock. Thus under a serial private placement, a QIB may be confident that it will be able to sell stock during the valuation period under

conditions virtually ensuring a gain equal to the 10% discount from the purchase price.

[0011] However, serial private placements also present certain disadvantages to the Issuer 10. Because the price is not determined until sales are made, the number of shares required to make up the desired amount of capital is not completely controllable by the Issuer 10. Under serial private placements, due to market fluctuations, the Issuer 10 does not have absolute control over either the price at which this stock is sold or the amount of shares to be sold. For instance, if the stock price falls precipitously during the 10-day valuation period, the Issuer 10 may have to sell stock at a decreasing share price. For this reason, deals often include a floor price so that if the stock trades below the floor price, the QIB is no longer obligated to purchase the stock. Therefore, the QIB may make a profit from short selling above the floor price and repurchasing stock below the floor price. In this case, the Issuer 10 will raise no capital.

[0012] Thus, to a large extent, there has not been a suitably effective and efficient method for raising capital which provides to a company sufficient control over the terms an Offering of its equity.

SUMMARY OF THE INVENTION

[0013] The present invention relates to a method and system

capital and a Capital Company 25. The Capital Company 25 provides assurance to the Issuer 10 that if the Underwriter 20 fails to sell the Issuer 10's shares according to a predetermined agreement, the Capital Company 25 will remedy the Underwriter 20's failure.

[0017] As shown in Figs. 4a and 4b, once the Issuer 10 has determined that it would like the control and flexibility of the FUEL process (step 203), the Issuer 10 may file a shelf registration statement (e.g., an S-3 registration) with a Regulatory Agency 30 for a primary issuance of common stock (step 205). Alternately, the Issuer 10 may utilize an existing shelf registration. The registration statement may or may not include agreements with the Underwriter 20 or the Capital Company 25. When approved by the Regulatory Agency, the registration statement is declared effective.

[0018] Subsequently, the Issuer 10 and the Underwriter 20 negotiate an Underwriting Agreement (step 210). In the Underwriting Agreement, the Issuer 10 and the Underwriter 20 must describe in detail how the Underwriter 20 will sell shares of stock in the Issuer 10. In particular, the Underwriting Agreement may set forward multiple terms, conditions, structures and options for the Offer using key variables (e.g., price, volume and timing of the Offering) in any number of variations. The multiple terms, conditions, structures and options may be tied to a particular event such as, e.g., a predefined drop in the Dow Jones Index, a predetermined increase in the price the Issuer 10's stock, etc. The Underwriting Agreement may also specify that the Underwriter 20 agrees to sell the shares on behalf of the

Issuer 10 on "a best efforts" basis.

[0019] The Underwriting Agreement may specify a time period ("Commitment Period") during which it is in effect. During the Commitment Period, the Issuer 10 may instruct the Underwriter 20 to raise capital in accordance with the terms and conditions set forth in the Underwriting Agreement or in the Capital Demand Notice. The Commitment Period may be of a predetermined length (e.g., one year) or it may expire upon occurrence of predefined events. For example, the Underwriting Agreement may terminate within 60 days of the sale by the Underwriter 20 of one million shares of the Issuer 10's stock.

[0020] In addition, the Underwriting Agreement may indicate that whenever the Issuer 10 wants to raise capital by selling securities, the Issuer 10 will send a Capital Demand Notice to the Underwriter 20. The Capital Demand Notice may be issued at any time during the Commitment Period. However, there may be a predefined time period between two consecutive Capital Demand Notices. Such predefined time period may be specified in the Underwriting Agreement and may vary depending, e.g., on market conditions or an internal event of the Issuer 10.

[0021] The Capital Demand Notice may specify (a) a time period for the offering ("Offering Period"); (b) a minimum price at which the shares are to be offered ("Floor Price"); and (c) a minimum amount of capital to be offered during the Offering Period ("Offering Volume"). For example, the Capital Demand Notice may specify an Offering Period of ten days

beginning on July 20, 2000 and an Offering Volume of one million shares at a Floor Price of \$24.00 per share. The Issuer 10 may set each of the terms of the Offering for each Capital Demand Notice. Depending on the specific terms of the Capital Demand Notice, the Underwriter 20 may be required to sell a predetermined percentage of the shares traded at or above the Floor Price during the Offering Period. The Capital Demand Notice may specify, for example, minimum and maximum capital amounts to be raised by the Underwriter, under specified conditions, during the Offering Period. The Capital Demand Notice is considered effective upon delivery by the Issuer 10 to the Underwriter 20.

[0022] The Underwriter Agreement may also specify that the Underwriter 20 will perform due diligence on the Issuer 10 and specify the terms of such review. For example, the Underwriting Agreement may specify the conditions under which the due diligence is to be performed and the criteria the Underwriter 20 may use to determine whether or not the results are satisfactory. The Underwriting Agreement may also specify a list of documents to be supplied by the Issuer 10 to the Underwriter 20 or which must otherwise be obtained by the Underwriter 20 to complete the due diligence review.

[0023] Furthermore, the Underwriting Agreement may specify a period of time allowed to the Underwriter 20 for the performance of the due diligence review of the Issuer 10 as related to each particular Capital Demand Notice ("the Due Diligence Period"). In particular, the Underwriting Agreement may specify, for example, when the Due Diligence Period is to begin and end, or otherwise define the length of such period.

For example, the Underwriting Agreement may specify that the Due Diligence Period must end before the Offering Period begins. Alternatively, the Underwriting Agreement may specify that the Due Diligence Period for a particular Capital Demand Notice begins when the Issuer 10 delivers or otherwise makes available all materials necessary for performing the due diligence review. For example, the Due Diligence Period may be specified as seven business days long, beginning on a specified day.

[0024] Simultaneously with the Underwriting Agreement, the Issuer 10 executes with a Capital Company 25 a Standby Agreement that provides that the Capital Company 25 will guarantee fulfillment of the Underwriting Agreement in case the Underwriter 20 fails to comply with its obligations under the Capital Demand Notice. For example, if the Capital Demand Notice specifies that the Underwriter 20 has agreed to sell 2,000 shares of stock in the Issuer 10 within thirty days but, due to market conditions, the Underwriter 20 is able to sell only 1,200 shares, the Capital Company 25 will be notified and, according to the Standby Agreement, will be required to purchase the remaining 800 shares at the Floor Price or other price specified in the Capital Demand Notice.

[0025] Those skilled in the art will understand that the Standby Agreement may be "flexible" and may include a plurality of conditions and terms. For example, the Standby Agreement may state that, if the market price for the shares of stock in the Issuer 10 drops below a predefined mark, then the Capital Company 25 may have to buy shares at a ten percent discount in comparison to the price specified in the Capital

Demand Notice.

[0026] After the Underwriting Agreement and the Standby Agreement have been executed, the Issuer 10 is required to file with the Regulatory Agency 30 a prospectus and a supplement (i.e., a post-effective amendment) to the previously filed shelf registration (step 215).

[0027] At this point, the Issuer 10 has complete control over the key terms of the Offering. The Issuer 10 is under no obligation to utilize the FUEL process once it is in place. If the Issuer 10 desires to use the FUEL process, the Issuer 10 sends a Capital Demand Notice to the Underwriter 20 in accordance with the Underwriting Agreement (step 225). The Capital Demand Notice generally indicates the Floor Price, the Offering Volume and the Offering Period for this particular Capital Demand Notice.

[0028] Upon receipt of the Capital Demand Notice, the Underwriter 20 conducts the due diligence review of the Issuer 10 during the Due Diligence Period specified in the Underwriting Agreement (step 230). During the due diligence review, the Underwriter 20 may review, for example, (1) whether the Issuer 10 has an effective registration statement with the Regulatory Agency 30; (2) whether the Issuer 10's representations and warranties are accurate; (3) the performance of the Issuer 10 and its prospects for the future; (4) the existence of adverse legal actions, rulings, injunctions, etc.; and (5) the existence of regulatory suspensions, etc.

[0029] Upon satisfactory completion of the due diligence review of the Issuer 10, the Underwriter 20 accepts the obligations of the Capital Demand Notice under the terms, conditions, structures and options of the Underwriting Agreement (step 235). At this point the Issuer 10 may be required to provide certain documents and materials to the Underwriter 20 before the Underwriter 20 begins selling the shares (step 240). For example, the Issuer 10 may be required to deliver an Officer's Certificate, predefined Legal Opinions, an Accountant's Letter, Transfer Agent Instructions, Clearing Broker Instructions, Issuer 10's bank/brokerage account, etc.

[0030] In step 245, the Underwriter 20 sells shares in the Issuer 10 during the Offering Period. As described above, the Offering Period, as well as other terms, may be specified in the Underwriting Agreement. For example, the Offering Period may start a day after the Issuer 10 has delivered all of the required papers specified in step 240 and continue for a length of time specified in the Underwriting Agreement.

[0031] Upon selling a portion of the shares of stock in the Issuer 10, the net capital is delivered to the Issuer 10 via a predetermined mechanism. For example, the raised capital may be automatically deposited in the brokerage account of the Issuer 10 with the Underwriter 20. The net capital may, for example, be equal to a number of shares sold multiplied by the selling price, minus the Underwriter 20's commission.

102120" E8840560

[0032] During the Offering Period, the Underwriter 20 may deliver to the Issuer 10 Underwriter Sales Notices as the shares are sold. An Underwriter Sales Notice may be provided to the Issuer 10 each day or at predefined time periods during the Offering Period. The Underwriter Sales Notice indicates the actual volume and price of the shares sold during the time period to which it pertains, and additional information including, e.g. \the Underwriter 20's commission, etc. The Underwriter 20's commission may be calculated based upon a formula agreed upon and specified, e.g., in the Underwriting Agreement.

[0033] During the Offering Period, the Issuer 10 may be required to notify the Underwriter 20 of the occurrence of any of a plurality of predefined Blocking Events (step 250). A Blocking Event may, for example, be an event which discharges the Underwriter 20 partially or completely from its obligations under the current Capital Demand Notice. For example, a withdrawal or suspension of the Issuer 10's registration by the Regulatory Agency 30; a predetermined breach of the Underwriting Agreement by the Issuer 10; failure of the Issuer 10 to deliver shares; the occurrence of predefined market conditions, etc. may be set forth in the Underwriting Agreement as Blocking Events. Whether or not the Issuer 10 is required to make such notice, or the conditions and content of such notice may also optionally be defined in the Underwriting Agreement.

[0034] As mentioned above, a particular Blocking Event may completely or partially discharge certain obligations of the

Underwriter 20. For example, the Underwriting Agreement may specify a drop in a particular market index of 10% or more as a Blocking Event and may further specify that, upon occurrence of this Blocking Event, the Underwriter 20 is required to sell only a predefined portion of the shares specified in the Capital Demand Notice. The Underwriting Agreement may further specify that the Issuer 10 has an opportunity to remedy specific Blocking Events, providing specifics for the method and timing of acceptable remedies and the required reaction of the Underwriter 20 in response to remedy employed by the Issuer 10. For example, if the Regulatory Agency 30 suspends the Issuer 10's registration, the Issuer 10 may have ten days to remedy the suspension by obtaining a reinstatement of the registration or a vacation of the previous suspension of registration. The Underwriting Agreement may then specify new time limits for the actions of the Underwriter 20 in response to the completion of this remedy.

[0035] During the Offering Period, the Underwriter 20 may exercise a Purchase Option by delivering a Purchasing Option Notice to the Issuer 10 (step 255). The Purchase Option which may be detailed in the Underwriting Agreement, defines an Underwriter 10's right to purchase additional shares above the amount of shares which, under the terms of the Capital Demand Notice, the Underwriter 20 is required to sell.

[0036] By the end of the Offering Period, the Issuer 10 determines whether the Underwriter 20 has fulfilled the terms of the Capital Demand Notice (step 260). For example, the Issuer 10 may check whether the Underwriter 20 has sold the Offering Volume specified in the Capital Demand Notice. If

the Underwriter 20 has failed to sell the Offering Volume specified in the Capital Demand Notice, the Capital Company 25 is notified and is required to remedy the Underwriter's shortcomings (step 265) in accord with the Standby Agreement. For example, if the Underwriter 20 has sold less than the Offering Volume, the Standby Agreement may specify that the Capital Company 20 is obligated to purchase the remaining amount of shares or perform other steps defined in the Standby Agreement to remedy the Underwriter 20's failure.

[0037] The Issuer 10 may repeat steps 225 through 265 as often as desired by executing additional Capital Demand Notices with new terms at any desired Floor Price, Offering Volume and for any desired Offering Period (step 270).

[0038] One of the advantages of the present invention is that it provides the Issuer 10 with system under which a firm commitment to raise capital (secured by the Standby Agreement) is available to the Issuer 10 on terms which the Issuer 10 controls. In particular, the Issuer 10 sets the price, timing, volume and amount of capital to be raised. The Issuer 10 may, for example, determine multiple points at which to sell its equity.

[0039] In addition, the present invention simplifies the process of raising capital for the Issuer 10. This system facilitates compliance with existing laws and regulations, and may avoid supplemental filings required by current capital-raising methods under which some of the relevant numbers (e.g., share price and number of shares) in the prospectus may not be

the Underwriter 20 and can then monitor the progress and terms of the sale of its equity on a daily basis. Under the prior system, the Issuer 10 was unable to monitor the progress of the private placements until after the transactions were complete and an average sale price was calculated by the underwriter and communicated to the issuer.

[0042] Figure 5 shows another alternative exemplary system which may be utilized to implement the FUEL process according to the present invention. In particular, the alternative exemplary system eliminates the need for the Capital Company 25 and a Standby Agreement. According to the system, the functionalities of the Standby Agreement are incorporated into a modified Underwriting Agreement ("Enhanced Underwriting Agreement"). Thus, the Issuer 10 need not execute a separate Standby Agreement with a Capital Company 25. Instead, an Enhanced Underwriting Agreement between the Issuer 10 and the Underwriter 20 incorporating some of the functionalities of the Standby Agreement described in regard to the above exemplary system, is executed. For example, the agreed guarantee of a Capital Company 25 to fulfill the Underwriting Agreement becomes, under the Enhanced Underwriting Agreement, the obligations of the Underwriter 20, itself.

[0043] This system offers Issuers 10 an efficient way to raise equity capital while maintaining ongoing control over the particulars (e.g., timing, pricing and size) of the equity offering. This modified FUEL process allows Issuers 10 to establish a system which may be subsequently used at any time within the predefined period.

[0044] In particular, the modified FUEL process may provide an "at-the-market" underwritten offering of equity, such as common stock. The Underwriter 20 serves as a conventional underwriter and, at the same time, guarantees predefined particulars of the offering. For example, the Underwriter 20 may guarantee the offering price and/or the offering size with the proceeds of the offering going directly to the Issuer 10.

[0045] Figures 6a and 6b illustrate a flowchart showing this modified exemplary FUEL process for raising capital which is similar to the process described above and shown in Figures 4a and 4b except as provided below. In step 213, the Issuer 10 and the Underwriter 20 enter into an Enhanced Underwriting Agreement. This modified agreement includes most of terms and clauses described above. However, since this modified exemplary FUEL process does not include a transaction with a Capital Company 25, no separate Standby Agreement is executed. Instead, the Enhanced Underwriting Agreement incorporates a firm commitment clause.

[0046] The firm commitment clause imposes an obligation on the part of the Underwriter 20 to the Issuer 10 to purchase a predetermined amount of the Issuer's equity if the Underwriter 20 fails to fulfill its obligations under the Enhanced Underwriting Agreement and/or a particular Capital Demand Notice. For example, if a Capital Demand Notice specifies that the Underwriter 20 has agreed to sell 2,000 shares of stock in the Issuer 10 within thirty days, but the Underwriter 20 is able to sell only 1,200 shares, according to the terms specified in the firm commitment clause, the Underwriter 20

minimum offering price specified in the Capital Demand Notice, the daily volume is to be set based on the minimum offering price. Those skilled in the art will understand that there are many ways to determine the predetermined amount which may be employed without departing from the scope of the present invention.

[0049] Another difference between the previously described Underwriting Agreements and this Enhanced Underwriting Agreement is that the Purchase Option of the previous Underwriting Agreement is replaced herein by a separate Warrant Agreement to be executed between the Issuer 10 and the Underwriter 20. Thus, in step 257, the Underwriter 20 may exercise the Warrant Agreement by delivering a notice to the Issuer 10. The notice may detail a number of additional shares the Underwriter 20 desires to sell. In addition, the Underwriting Agreement may provide that the Underwriter 20 may not sell "short" shares of the Issuer 10.

[0050] The Warrant Agreement may grant the Underwriter 20 the right to purchase a specified number of shares pursuant to the amount defined in the Enhanced Underwriting Agreement and/or the time period in which the Warrant Agreement is to be executed. For example, the Warrant Agreement may, for example, grant the Underwriter 20 the right to buy an amount of shares equal to 10 percent of the firm commitment amount divided by the exercise price beginning the first trading day following the expiration of the first Offering Period. Then in each subsequent Offering Period, the Underwriter 20 may be allowed to purchase an additional amount of shares equal to 10 percent of the number of shares sold during such Offering

Period. Furthermore, the Warrant Agreement may include features similar to those of a conventional underwriters' warrant including, e.g., a one year lockup on the exercise of any warrant.

[0051] In step 260, a determination is made as to whether the Underwriter 20 has fulfilled its obligations under the Enhanced Underwriting Agreement as a whole and/or under a particular Capital Demand Notice. For example, the Capital Demand Notice may specify a number of shares to be sold by the Underwriter 20. If the number of shares actually sold by the Underwriter 20 is less than the number of shares specified in the Capital Demand Notice, the Underwriter 20 is determined not to have fulfilled its obligation under that Capital Demand Notice.

[0052] When the Underwriter 20 has failed to fulfill such an obligation, the Underwriter 20 must remedy this failure according to the firm commitment clause of the Enhanced Underwriting Agreement (step 263). According to the example described above, the Underwriter 20 would be required to purchase a number of shares equal to the difference between the number of shares specified in the firm commitment clause and the number of shares actually sold by the Underwriter 20.

[0053] This system and method presents a number of advantages over conventional systems and methods. For example, this system allows an Issuer 10 which may have already established a FUEL system, to raise capital in a short time period (e.g., 5 business days), while minimizing time,

effort and resources which need to be spent by the Issuer 10 (e.g., on performing "road shows" or continuously negotiating with potential purchasers) in raising the capital.

[0054] The present invention also provides a certain degree of flexibility to the Issuer 10 in raising the capital. For example, as the Issuer 10's stock price increases, the Issuer 10 may reduce the number of shares to be sold while raising the desired amount of capital. This may, e.g., reduce the dilutive impact for existing shareholders.

[0055] There are many modifications to the present invention which will be apparent to those skilled in the art without departing from the teaching of the present invention. The embodiments disclosed herein are for illustrative purposes only and are not intended to describe the bounds of the present invention which is to be limited only by the scope of the claims appended hereto.